Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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80-1216

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CORTES W. RANDELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against self-incrimination and the principles of *Grunewald* v. *United States*, 353 U.S. 391 (1957), forbid the indictment and conviction of a defendant under the federal mail fraud statute for failing to reveal his offense to the Grand Jury and the Securities and Exchange Commission.[1]

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[1] In addition to petitioner, his co-defendant John B. Mumford was a party to the proceedings in the courts below. Mumford has filed a separate petition for a writ of certiorari raising an issue unrelated to that presented here. See Petition for a Writ of Certiorari, *Mumford* v. *United States*, No. 80-5818.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A, *infra,* pp. 1a to 11a) is reported at 630 F.2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1980 (Pet. App. B, *infra,* p. 13a). On November 19, 1980, the court of appeals denied a timely petition for rehearing (Pet. App. C, *infra,* p. 15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The federal mail fraud statute (18 U.S.C. § 1341) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner and his co-defendant John B. Mumford were convicted on all counts of a seventeen-count Indictment. The court sentenced petitioner to terms of imprisonment on Counts One to Seven and to a suspended sentence on the remaining counts.[2]

Each of the first seven counts on which petitioner received a sentence of imprisonment charged him and his co-defendant with mail fraud, in violation of 18 U.S.C. § 1341.[3] Paragraph B of Count One set forth in detail the scheme the defendants allegedly devised and executed to defraud investors in National Commercial Credit Corporation (NCCC) and financial institutions in order to obtain money and property.[4]

The allegations in the seven mail fraud counts centered on defendants' involvement with two Virginia corporations that invested in second mortgages—NCCC and Federal Mortgage Acceptance Corporation—from 1974 through mid-1975 (J.A. 7-17).[5] Ac-

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[2] Petitioner received concurrent terms of five years' imprisonment on Counts 1-4; concurrent terms of two years' imprisonment on Counts 5-7, to run consecutively with the sentences on Counts 1-4; and a suspended sentence on counts 8-17, with a five-year term of probation to run consecutively with the sentences on Counts 1-7.

[3] The remaining counts charged securities fraud, in violation of 15 U.S.C. §§ 77q(a) and 77x (Counts 8-12); interstate transportation of securities and money taken by fraud, in violation of 18 U.S.C. § 2314 (Counts 13-16); and a violation of 18 U.S.C. § 1001 (Count 17).

[4] The original Indictment is reprinted at pp. 7-28 of the Joint Appendix (J.A.) in the court of appeals.

[5] These allegations also served as the basis for the securities fraud counts (Counts 8-12) and the counts charging interstate trans-

cording to part B of Count One, defendants allegedly induced some of NCCC's investors in 1974 to exchange their bonds for unsecured corporate notes and induced financial institutions to loan money to NCCC without disclosing the poor financial condition of the company resulting from defaults on the second trust notes held as security for the bondholders and as collateral for the loans.

The Indictment was returned on October 5, 1978, and the mailings that were said to have accomplished the scheme to defraud occurred between August 1974 and February 1975 (J.A. 18-21). However, the Indictment alleged that the scheme to defraud began on February 1, 1974, and continued "up to the date of this Indictment" (J.A. 8). The assertion that petitioner had engaged in such a continuing offense was based on the final paragraph of part B of Count One, which alleged in pertinent part (J.A. 17):

> CONCEALMENT
>
> It was further a part of the scheme and artifice to defraud that the defendants CORTES W. RANDELL and JOHN B. MUMFORD would and did conceal and cause to be concealed from . . . the United States Securities and Exchange Commission, and a federal grand jury, the scheme and artifice to defraud described above in Paragraphs 2(a) thru (w) of this Count.

The Indictment specifically "realleged and incorporated" this concealment allegation in each of the following mail fraud and securities fraud counts.[6]

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portation of money taken by fraud (Counts 13-16). Count 17 concerned co-defendant Mumford's obtaining a loan guarantee from the Veterans Administration to purchase his home.

[6] See paragraphs A of Counts 2 to 12 (J.A. 19-26).

Prior to trial petitioner moved to dismiss the Indictment on the ground that because of the concealment allegations in the first twelve counts, the grand jury had indicted him in violation of his Fifth Amendment privilege against self-incrimination and the principles of *Grunewald* v. *United States,* 353 U.S. 391 (1957). After filing a memorandum in opposition to petitioner's motion to dismiss, the government apparently had second thoughts. At the pretrial hearing, the government moved to strike the words "grand jury" from the concealment paragraph. District judge (Oren R. Lewis) granted the government's motion despite petitioner's protest that merely erasing this language would not change the fact that the grand jury had acted in violation of the Fifth Amendment by charging petitioner with failing to reveal his offense (J.A. 46-47).

Although the "grand jury" reference was thus removed, the charge incorporated in the first twelve counts regarding petitioner's concealment of his offense from the Securities and Exchange Commission remained in the Indictment, which was sent to the jury for use in its deliberations (Tr. 1251). During the trial, the only evidence that directly touched on concealment consisted of the testimony of a government witness, Barbara Fisher, who recounted a meeting with petitioner in February 1976 (Tr. 282). The subject of the meeting, however, dealt not with the SEC but with Fisher's "coming in to the United States Attorney's Office" (Tr. 282). According to Fisher, who had worked in the sales office of NCCC and was an incorporator and partner in a successor company (Tr. 278, 785), petitioner told her she should be careful about what she said to the United States Attorney or petitioner would say she was the cause of the "investors losing their money" (Tr. 282-283).

Aside from this, the jury was told by many government witnesses that they had testified before the SEC in late 1976 or in 1977 and before the federal grand jury in 1978 regarding petitioner's activities at NCCC. Petitioner had not appeared before the SEC or the grand jury and did not take the stand in this case, but his co-defendant Mumford did testify at trial; Mumford told the jury of his appearance before the SEC and testified that he had never refused to answer any questions the SEC had asked him (Tr. 1097).

The court of appeals affirmed (Pet. App. A, *infra,* at pp. 1a to 11a). The court held that even if the grand jury had indicted petitioner "because of his failure to testify before them or before the SEC, his conviction would not need to be reversed"; "under the concurrent sentence doctrine," the court stated, "it would not be necessary to review the validity of his conviction on Count One" in light of his sentence of imprisonment on Counts Two to Five (*id.* at 11a n. 7). The court did not mention the fact that the concealment charge was not only included in Count One but also specifically realleged and incorporated in each of the other counts on which petitioner received a sentence of imprisonment (Counts 2-7). See p. 4 *supra.*

With respect to charge of concealment from the grand jury, the court of appeals appeared to agree that this violated petitioner's Fifth Amendment privilege (*id.* at 9a). Since the allegation had been deleted prior to trial, the court characterized petitioner's argument as a contention that the revision constituted an inpermissible amendment of the indictment (*id.* at 10a). Having framed the issue in these terms, the court held that the deletion of the words "grand jury" was permissible (*ibid.*).

As to the charge that petitioner concealed his offense from the SEC, the court of appeals thought there was evidence to support this. The court said the charge could have been based on the testimony of Barbara Fisher, which the court mistakenly said concerned her meeting with a SEC attorney (see p. 5 *supra*) or on petitioner's failure to disclose material facts to investors (*id.* at 10a). The court did not address petitioner's constitutional arguments concerning this allegation, which also appeared in the first twelve counts of the Indictment (see p. 4 *supra*).

REASONS FOR GRANTING THE WRIT

This is an important case with far-reaching consequences. Despite the Fifth Amendment privilege against self-incrimination, the court of appeals has held that a person may be indicted and convicted for failing to reveal his crimes to the government. In so holding, the court has thrust itself into direct conflict with decisions of other courts of appeals and of this Court without acknowledging those contrary decisions, which were cited to it.

Count One of the original Indictment in this case charged that petitioner "did conceal" the fraudulent scheme alleged in the preceding paragraphs from "the United States Securities and Exchange Commission, and a federal grand jury." Seeking to invoke the concurrent sentence doctrine, the court's opinion states that this allegation appears only in Count One. In fact, as we have discussed in the statement (p. 4 *supra*), the offending language is realleged and incorporated in the next eleven Counts[7] and the issue

[7] See the first paragraphs of Counts 2-12 (J.A. 19-26).

presented by these charges therefore cannot be avoided.[8]

Other courts of appeals have firmly rejected the notion that a person may be indicted and convicted for failing to reveal his own criminal conduct *even when he has taken affirmative steps to conceal his crime.* Thus, "the Fifth Amendment protection against prosecution for not disclosing and concealing a crime operates whenever" the crime is allegedly the defendant's own offense. *United States* v. *Jennings,* 603 F.2d 650, 653 (7th Cir. 1979); see, *e.g., United States* v. *Kuh,* 541 F.2d 672, 677 (7th Cir. 1976); *United States* v. *King,* 402 F.2d 694, 697 (9th Cir. 1968); *United States* v. *Graham,* 487 F.Supp. 1317, 1319 (W.D. Ky., 1980).[9]

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[8] The court's opinion also incorrectly states that petitioner received "concurrent terms on the first *five* counts of mail fraud. . . ." (Pet. App. *infra,* at p. 11a; emphasis added). In fact, concurrent sentences of five years' imprisonment were imposed on the first *four* counts, as the court itself had stated earlier in the opinion, *id.* at 2a. Concurrent sentences of two years' imprisonment, to run consecutively with the sentences on Counts 1-4, were imposed on Counts 5-7 (see p. 3 n.2 *supra*).

[9] The opinion in *United States* v. *Kuh, supra,* 541 F.2d at 677, is worth quoting at length because it bears so directly on the quession presented here:

> The object of the Fifth Amendment is to insure that a person should not be compelled to give information which might tend to show he himself has committed a crime. *Lefkowitz* v. *Turley,* 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). Under the circumstances of this case, we cannot accept the argument that, although a person who fails to disclose a felony in which he might be implicated is protected from punishment by the Fifth Amendment, his failure to make known the felony, when coupled with an act of concealment, makes him susceptible to prosecution, conviction, and punishment under 18 U.S.C. § 4. If the duty to notify federal authorities is precluded by constitutional privilege, it is difficult to understand how a conviction could be substantiated.

While placing itself in direct conflict with those decisions, the court of appeals also ignored that under *Hale* v. *Henkel,* 201 U.S. 43, 66 (1906) and *Grunewald* v. *United States,* 353 U.S. 391, 421 (1957), no one may be prosecuted for exercising his Fifth Amendment privilege by refusing to divulge his own criminal activity to any arm of the government. This is why, for example, a prosecutor at trial would be forbidden from alleging that the defendant should have revealed his crime to the government. See *Griffin* v. *California,* 380 U.S. 609 (1965). Yet in this case, an indictment containing such language was sent to the jury, thus compounding the constitutional violation by emphasizing to the jury in official written form what the government was barred from asserting in open court.

The importance of the issue presented here is underscored by this Court's recent decision in *Roberts* v. *United States,* —— U.S. —— (No. 78-1793, decided April 15, 1980) (100 Sup. Ct. 1358). After stating that "[c]oncealment of crime has been condemned throughout our history," the Court added that the obligation to divulge knowledge of criminal activity "is not diminished when the witness to the crime is involved in illicit activities himself" (100 Sup. Ct. at 1363). The Court acknowledged, however, that whether a criminal defendant had such a duty depended upon whether his silence was protected by the privilege against self-incrimination (*ibid.*) Although that was an issue meriting "serious consideration," the Court found it unnecessary to decide in *Roberts* (100 Sup. Ct. at 1364-1365).

The issue is squarely presented in this case. Rather than addressing the constitutional arguments, the

court below attempted to show that there was evidence to support the unconstitutional charges. The other courts of appeals correctly consider this as totally beside the point.[10]

Moreover, the court's reasoning that the charges of concealment from the SEC might have been based on the omission of material facts in a letter sent to investors (Pet. App., *infra*, p. 10a) places it squarely in conflict with the holding in *United States* v. *Dixon*, 536 F.2d 1388, 1401 (2d Cir. 1976) (Friendly, J.), that when (as here) the only unlawful acts by which the scheme was accomplished were mailings to others, the scheme could not possibly have encompassed deceiving the SEC by concealing the truth from it. In short, there was simply no evidence at trial to support the charges that petitioner took affirmative steps to conceal his crime from the SEC, but even if there were, the decisions cited above from the Seventh and Ninth Circuits hold in the clearest possible terms that prosecution and conviction on that ground violates a defendant's Fifth Amendment privilege.

As to the similar charges, contained in the first twelve counts, that petitioner concealed his crime from the grand jury, the court of appeals appeared to agree that these charges violated the Fifth Amendment (Pet. App., *infra*, at p. 9a),[11] but held that the prosecutor's

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[10] In any event, the court's statement that there was evidence to support the charge of concealment from the SEC in light of petitioner's attempt to persuade a witness (Fisher) to be less than candid "when she met with the SEC attorney" (Pet. App., *infra*, at p. 10a) is clearly in error. As we discussed in the Statement (p. 5 *supra*), Fisher's meeting was with the United States Attorney.

[11] The court did not explain why the SEC concealment charges stood on any different footing.

deletion of them from the Indictment was not an impermissible amendment (*id.* at pp. 9a-10a). However, striking these words from the Indictment in no way altered the fact that the grand jury here indicted petitioner in violation of his Fifth Amendment privilege —that is, because he did not come forward and reveal his crime to the grand jury that returned the Indictment. If a grand jury indicts in violation of a defendant's constitutional privilege against self-incrimination the remedy must be dismissal of the indictment, just as the remedy is reversal when a petit jury convicts on such a basis.

In short, petitioner's indictment and conviction in these circumstances has resulted not only in a violation of this particular defendant's Fifth Amendment privilege, but also in stripping potential defendants of their privilege in future SEC and grand jury proceedings, where they would be forced to testify lest they suffer the charge of concealing their alleged criminal activities from these agencies of the government. The grand jury's Indictment violated petitioner's Fifth Amendment privilege and his conviction on that Indictment presents an important constitutional issue warranting review by this Court.

Moreover, the concealment charges in this case violated the principles of *Grunewald* v. *United States,* 353 U.S. 391 (1957), in which the indictment alleged that an agreement to conceal a conspiracy was part of the conspiracy to defraud. Although Counts One through Seven of the Indictment here were brought under the mail fraud statute (18 U.S.C. § 1341), the case is essentially the same as *Grunewald*: when a scheme to defraud is purportedly shared by two or more persons it is considered a conspiracy to defraud,

even though a conspiracy has not been formally charged. See *United States* v. *Perkal,* 530 F.2d 604, 606 (4th Cir. 1976).

In reversing defendants' convictions, the Court in *Grunewald* held that since every conspiracy is by its nature secret and since the participants necessarily wish to avoid detection, sanctioning the government's concealment theory "would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." 353 U.S. at 402. The same, of course, is just as true with respect to mail fraud cases such as this involving two or more defendants.

Although concealing a scheme to defraud from persons, such as investors, may be a proper allegation in a mail fraud indictment, see, *e.g., Walters* v. *United States,* 256 F.2d 840, 843 (9th Cir. 1958), this does not save the charges here. As the Court held in *Grunewald* (353 U.S. at 405), "a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy"—or, as here, the fraudulent scheme—"and acts of concealment done after those central objectives have been attained, for the purpose only of covering up after the crime." In this case the Indictment itself indicated that the main objectives of the supposed scheme ended in 1974 or 1975, when the mailings occurred, and that it was years later when the Grand Jury returned this Indictment and the SEC issued its complaint (see Pet. App., *infra,* at pp. 2a-5a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 1981.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5087

UNITED STATES OF AMERICA, *Appellee,*

v.

JOHN B. MUMFORD, *Appellant.*

No. 79-5088

UNITED STATES OF AMERICA, *Appellee,*

v.

CORTES W. RANDELL, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., District Judge.

Argued: August 13, 1980 Decided: October 2, 1980

Before FIELD, Senior Circuit Judge; HALL and SPROUSE, Circuit Judges.

A. Raymond Randolph, Jr. (V. Thomas Lankford, Jr., Richard A. Kaplan, Sharp, Randolph & Green on brief) for Appellant in 79-5088; David S. Cupps (Joseph D. Lonardo, Vorys, Sater, Seymour and Pease; Gregord L. Murphy, Murphy, McGettigan, McNally & West on brief) for Appellant in 79-5087; Carolina Heck, Department of Justice (Morris B. Silverstein, Department of Justice, William C. Bryson, Department of Justice; Justin W. Williams, United States Attorney, Theodore S. Greenberg, Assistant United States Attorney on brief) for Appellee.

HALL, Circuit Judge:

John Mumford and Cortes Randell were convicted by a jury on seven counts of mail fraud in violation of 18 U.S.C. § 1341; five counts of securities fraud in violation of 15 U.S.C. §§ 77(q)(a) and 77(x); four counts of interstate transportation of securities and money obtained by fraud in violation of 18 U.S.C. § 2314; and on one count of submitting a false statement to a United States agency in violation of 18 U.S.C. § 1001. Mumford was sentenced to three years' imprisonment on the false statement conviction, with all but six months of the term suspended, and to five years' concurrent probation on all 17 counts. Randell was sentenced to concurrent five-year terms for his conviction on four counts of mail fraud and to concurrent two-year terms for his conviction on three other mail fraud counts to run consecutively with the first sentence. From their convictions Mumford and Randell noted their respective appeals. Upon consideration of the briefs and after oral argument, we affirm their convictions.

I.

On October 5, 1978, Mumford and Randell were indicted by a federal grand jury for their alleged participation in a scheme to defraud investors and financial institutions.

The alleged scheme was founded on the appellants' involvement in two Virginia corporations, the National Commercial Credit Corporation (NCCC) and the Federal Mortgage Acceptance Corporation (FMAC). NCCC was originally formed as Potomac Valley Homes in 1966 for the purpose of dealing in the second mortgage business. It had become NCCC in the early part of 1973 when Randell was hired to strengthen it and to prepare it for public offering as he had done in the 1960's with the National

Student Marketing Corporation.[1] Randell's wife, Joan, loaned NCCC $140,000 in 1973. This loan was collateralized by $205,000 worth of NCCC second mortgages. Through his wife's investments, Randell increased his control over NCCC's operations. The government charged that the appellants concealed the extent of Randell's control over and interest in NCCC from financial institutions and investors.

In early 1974 Randell hired Mumford as a vice-president and director of NCCC. As such Mumford was responsible for the administration of operations which included approving expenditures, signing checks, determining the movement and pledging of NCC's second mortgage notes, regulating corporate policies and procedures, and dealing with financial institutions, investors and lawyers.

In July of 1974, FMAC was formed ostensibly for the purpose of purchasing second mortgage notes. The majority stockholder was Joan Randell. Mumford became president of both NCCC and FMAC in late July of 1974. The appellants were charged with using FMAC to obtain money from financial institutions by pledging as collateral second trust notes which were not sound. The government also alleged that FMAC, through the appellants' control, was used to usurp business opportunities to the detriment of NCCC investors and that FMAC sold second trust notes to NCCC which were not worth the selling price. FMAC was capitalized by the notes which had served as collateral for the NCCC loan from Joan Randell. These notes were listed as assets on the books of both FMAC and NCCC. Joan Randell called her $140,000 loan due on July 5, 1974, but NCCC continued to pay her $1600 a month in interest throughout 1974. As a further part of the scheme to defraud, Mumford and Randell allegedly concealed from

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[1] Randall had been convicted of and served a prison sentence for securities fraud arising from his involvement with the National Student Marketing Corporation.

investors and financial institutions the fact that Joan Randell had called her loan due. They were also accused of failing to minimize the financial loss which resulted when the collateral, the second trust notes which were then worth $280,000, were transferred to Joan Randell.

Financing for the NCCC and FMAC operations was obtained in primarily one or two ways. First, both corporations obtained loans by pledging as collateral second mortgage notes that were represented to be sound and current. The indictment charged that Randell and Mumford caused to be circulated false and misleading financial statements in order to obtain these loans and loan guarantees; that the appellants pledged delinquent and defaulted second trust notes to secure financing from various financial institutions; and that the appellants knowingly made false, fraudulent and incomplete representations to various financial institutions and to the Veterans Administration. The appellant Randell was also charged with scheming to divert and diverting loans obtained by FMAC to his personal account to be used for purposes unconnected with FMAC.

Second, NCCC also raised money from private investors. In 1971 NCCC made a bond offering of $300,000 for 10% bonds to be secured by collateral mortgages equal to 125% of the amount borrowed. The government alleged that Mumford and Randell did not segregate and maintain sufficient collateral to secure this bond offering, and that when an inspection of such collateral was requested, the appellants complied by assembling for inspection certain collateral which was already pledged.

In 1974 Mumford and Randell proposed a conversion offer which would exchange 12% unsecured corporate notes for the 10% secured bonds. Upon the advice of a NCCC attorney, a letter proposing the exchange was sent to the

bond holders. In connection with the letter detailing the conversion offer, Mumford and Randell were charged with omitting certain material facts which made the statement misleading. Mumford and Randell met with some of the investors who were considering the exchange offer to assure them about the soundness of their investment. At this meeting at least one investor was told that NCCC was doing very well (when in fact it was not) and was given a financial statement of NCCC which had attached to it an unauthorized addendum.

In the fall of 1974, Mumford applied to the Metropolitan Mortgage Fund (MMF) for home financing, and to the Veterans Administration for a loan guarantee. On these applications Mumford indicated that he would not be using funds borrowed from other sources to purchase the home. The indictment charged that Mumford intended to use $20,000 that he had borrowed from Joan Randell which was secured by a $27,000 deed of trust note to FMAC.

On December 11, 1977, the Securities and Exchange Commission (SEC) filed a complaint for a permanent injunction and ancilliary relief naming Cortes Randell, John Mumford and others as defendants. The complaint alleged that the defendants had violated, were violating and were likely to continue to violate various securities laws. All of the defendants except Mumford consented to the entry of a permanent injunction and other equitable relief without admitting or denying the SEC charges. On February 24, 1978, the district court dismissed the SEC's request for injunctive relief against Mumford on the ground that the SEC had failed to prove that he had either violated or was likely to violate securities laws. The SEC appealed the dismissal of its complaint to this court. We affirmed the judgment of the district court. *SEC* v. ***Mumford,*** No. 78-1386 (4th Cir. Feb. 22, 1980).

II.

John Mumford raises four issues on appeal.[2] Initially, Mumford contends that his earlier trial on the charges brought by the SEC barred his criminal trial on the ground of *res judicata* or collateral estoppel.

The appellant's *res judicata* argument raised in the context of this case presents a difficult issue which is not often confronted by the courts. Seldom does the government, having had an issue determined adversely to it in a civil action with the less demanding burden of proof, institute criminal proceedings on the same facts and issues against the same party. However, only one circuit has held it unfair to allow the government to try again in a criminal trial issues which were determined adversely to it in a prior civil action. *Dranow* v. *United States*, 303 F.2d 545 (8th Cir. 1962).[3]

The principal of *res judicata* dictates that there be an end to litigation. "[I]t rests upon consideration of economy of judicial time and public policy favoring the establishment of certainty in legal relations," *Commissioner* v. *Sunnen*, 333 U.S. 586, 587 (1948); however *res judicata* serves as a bar to a subsequent litigation only when the prior judgment was returned by a court of competent jurisdiction, when the prior judgment was a final judgment on the merits, when the same parties and their privies are involved in both suits, when the two actions are based on the same issues and material facts and when the two proceedings present the same cause of action. *Id.* The SEC complaint was for prospective injunctive relief, an equitable action which is in many respects *sui generis*. This

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[2] Randell joins in Mumford's appeal, except on the issue of severance.

[3] In *Dranow*, the court held that where the object of both proceedings was punishment, there was no doubt that *res judicata* barred the second trial.

trial is a criminal action.[4] Since the two proceedings do not present the same cause of action, *res judicata* does not bar the criminal prosecution of Mumford.[5]

Unlike *res judicata*, the doctrine of collateral estoppel may be applicable when the first cause of action was civil and the second is criminal. *Yates* v. *United States*, 354 U.S. 298 (1956); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). Collateral estoppel precludes the relitigation of issues actually litigated which were necessary to the outcome of the first action. 1B J. Moore, Federal Practice ¶ 0.405[1] (2d ed. 1974). Mumford argues that collateral estoppel bars relitigation of the question of his past criminal conduct since the order dismissing the SEC civil action stated that the evidence "falls short of that necessary to find that he [Mumford] had willfully violated any of the SEC laws." While the written order appears to resolve the issue of Mumford's willful violation of SEC laws adversely to the government, a review of portions of the transcript reveals that on numerous occasions the trial judge made it clear that the court did not intend to reach the merits of the charges relating to Mumford's past conduct. The civil trial focused solely on whether the requested injunctive relief should be granted. The only issue actually litigated in the SEC action was the likelihood that Mumford would engage in future SEC violations. Since the two proceedings addressed different issues, collateral

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[4] We recognize that a difference in remedies sought does not alone differentiate the underlying claims. *Williams* v. *Ward*, 556 F.2d 1143 (2d Cir. 1977); *Lambert* v. *Conrad*, 536 F.2d 1183 (7th Cir. 1976). However, the difference between the present underlying claims with their differing elements and burdens of proof is so great that there exist two separate causes of action.

[5] Randell's reliance on the prior SEC action for preclusive effect is misplaced since he was not a party to the SEC proceeding. Nor can Randell argue that the consent decree has any preclusive effect since there was not an adjudication of the issues.

estoppel does not apply. The district court properly denied the appellant's motion to dismiss the indictment.

Mumford argues that the district court erred in failing to dismiss the indictment because of alleged prosecutorial misconduct before the grand jury. The alleged misconduct stems from the appearance before the grand jury of a SEC attorney who had participated in the investigations which led to the SEC civil action. We find this argument to be without merit.

Mumford also contends that his motion for mistrial should have been granted because of the government's assertedly improper and prejudicial questions to a witness about his prior conviction for fraud. The record supports the government's contention that this questioning was a proper trial strategy designed to take the "sting" out of cross-examination. Furthermore, the jury was given a cautionary instruction which was sufficient to ensure the proper use of evidence. *United States* v. *Bobo*, 477 F.2d 974 (4th Cir. 1973).

Mumford's last ground for appeal relates to the district court's denial of his motion for severance. Since the original joinder was proper under Rule 8(b) of the Federal Rules of Criminal Procedure, we uphold the denial of the motion to sever since there is no showing that the trial judge abused his discretion.

III.

In addition to joining in Mumford's appeal, Cortes Randell raises six issues of his own on appeal. First, he contends that the prosecution's conduct at trial in eliciting testimony from various witnesses was improper. A review of the record discloses that the instances of prosecutorial misconduct cited by Randell were isolated occurrences which drew swift rebukes from the trial judge in a lengthy and complicated trial. Furthermore, "every slight excess

does not require that a jury's verdict be overturned and a new trial awarded." *United States* v. *Borda*, 285 F.2d 405, 408 (4th Cir. 1961).

Second, Randell assigns as error certain evidentiary rulings made during the trial regarding the admissibility of Randell's prior conviction for securities fraud as well as the propriety of propounding what Randell characterized as hypothetical questions to law witnesses. We find that the trial judge did not abuse his discretion on either of these evidentiary rulings. *United States* v. *Mastrotaro*, 455 F.2d 802 (4th Cir. 1972).

Third, Randell contends that he was indicted and convicted for his failure to testify before the SEC and the federal grand jury.[6] Randell did not testify before either the grand jury or the SEC. He argues that the portion of the indictment which charged him with concealing the scheme to defraud constitutes a penalty on the exercise of his fifth amendment privilege against self-incrimination.

It is axiomatic that no person may be penalized for the exercise of a constitutional privilege. *Grunewald* v. *United States*, 353 U.S. 391 (1957). The privilege against self-incrimination extends to grand jury and other governmental proceedings. *Hale* v. *Henkel*, 201 U.S. 43 (1906). The indictment as originally returned did contain the words "federal grand jury;" however, these words were stricken

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[6] Randell's argument centers on Count I, ¶ B2 x of the indictment as originally returned which charged:

> It was further a part of the scheme and artifice to defraud that the defendants CORTES W. RANDELL and JOHN B. MUMFORD would and did conceal and cause to be concealed from investors, financial institutions, the State Corporation Commission of Virginia, the Veterans Administration, the United States Securities and Exchange Commission, and a federal grand jury, the scheme and artifice to defraud described above in Paragraphs 2(a) through (w) of this Count.

prior to trial on the government's motion. It is argued that the deletion of these words constituted an amendment of the indictment which can not be done except by resubmission to the grand jury. *Russell* v. *United States*, 369 U.S. 749 (1962). We find this argument to be unpersuasive. The deletion of the words "federal grand jury" only narrowed the charges against Randell; indeed, the deletion was favorable to Randell since no evidence was presented at trial on this charge. *United States* v. *Holt*, 529 F.2d 981 (4th Cir. 1975).

We must therefore decide whether that portion of the indictment which charged Randell with concealment from the SEC of the scheme to defraud amounted to a comment on his failure to come before the SEC. There is nothing in the record to support Randell's contention that he was penalized for failing to testify before the SEC. There is no indication that Randell was ever asked to appear before any representative of the SEC. However, the grand jury did hear testimony that established that Cortes Randell had spoken to Barbara Fisher, a former NCCC employee, about her pending meeting with a Securities and Exchange Commission attorney. There was other evidence which showed an attempt by Randell to persuade Ms. Fisher to be less than candid about NCCC's operations when she met with the SEC attorney. It is reasonable to assume that Randell's efforts at persuasion could be considered concealment or attempted concealment. It is also reasonable to assume that Randell was indicted for concealment from the SEC of the scheme to defraud because of his failure to include certain material facts in the conversion offer letter he and Mumford prepared and sent to investors. Randell's argument that the grand jury indicted him for concealment because he failed to testify before the SEC is, in our opinion, unsupported by the record and does not warrant the dismissal of the indictment. *United*

States v. *West*, 549 F.2d 545 (8th Cir.), *cert. denied*, 430 U.S. 956 (1977).[7]

The remaining points upon which Randell seeks reversal, that the trial judge erred in submitting a lengthy "speaking" indictment to the jury and that Randell's conviction as an aider or abettor cannot be sustained if Mumford's conviction is reversed, have been considered and found to be untenable.

Accordingly, we affirm the convictions of Mumford and Randell. The judgments of the district court are hereby

AFFIRMED.

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[7] Even if the grand jury had charged Randell with concealment because of his failure to testify before them or before the SEC, his conviction would not need to be reversed. Since Randell was sentenced to concurrent jail terms on the first five counts of mail fraud, under the concurrent sentence doctrine it would not be necessary to review the validity of his conviction on Count 1. *United States* v. *Truong Dinh Hung*, No. 78-5176/77 (4th Cir. July 17, 1980). There is no substantial possibility that Randell's conviction on Count 1 of the indictment will adversely affect his right to parole nor will it subject him to adverse collateral consequences. *Benton* v. *Maryland*, 395 U.S. 784 (1969); *Close* v. *United States*, 450 F.2d 152 (4th Cir. 1971), *cert. denied*, 405 U.S. 1068 (1972).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5088

UNITED STATES OF AMERICA, *Appellee,*

vs.

CORTES W. RANDELL, *Appellant.*

JUDGMENT

[Filed October 2, 1980]

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ WILLIAM K. SLATE, II
Clerk

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5088

UNITED STATES OF AMERICA, *Appellee,*

versus

CORTES W. RANDELL, *Appellant.*

ORDER

Filed November 19, 1980

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Field, Judge Hall, and Judge Sprouse.

For the Court,
/s/ WILLIAM K. SLATE, II
Clerk

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